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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PETER MICHAEL LOPEZ, Defendant and Appellant.	B276739 (Los Angeles County Super. Ct. No. BA384468)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Judgment of conviction affirmed; matter remanded with directions.

Corona & Peabody and Jennifer Peabody, for defendant and appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Peter Michael Lopez of second degree murder, with street gang and firearm enhancements, and of being a felon in possession of a firearm. Lopez appeals the judgment, raising claims of ineffective assistance of counsel, insufficiency of the evidence to prove the gang enhancement, instructional error, and cumulative prejudice. Lopez additionally contends the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancement in light of Senate Bill No. 620's amendment of Penal Code section 12022.53,[1] and to permit a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). Lopez further requests that we review the sealed record of the trial court's *Pitchess*[2] review of peace officer records to determine whether the court abused its discretion by failing to order disclosure. We order the judgment of conviction affirmed, but order Lopez's sentence vacated and the matter remanded for resentencing and for a *Franklin* hearing.

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts

1. People's evidence

Viewed in the light most favorable to the judgment (*People v. Najera* (2006) 138 Cal.App.4th 212, 215; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303—1304), the evidence relevant to the issues presented on appeal established the following.

Lopez, codefendant Hakop Sardaryan, and Jeffrey Cardona were members of the "Fuck The World" (FTW) gang. Lopez and

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[1] All further undesignated statutory references are to the Penal Code.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Sardaryan sported "Fuck The World" tattoos on their chests, and Cardona had the same tattoo on his arm. Rafael Ramirez was Cardona's best friend, but was not a member of FTW. Ramirez was also friends with appellant and Sardaryan. Brianna "Cat" Medina was Sardaryan's girlfriend. Lopez had suffered a prior felony conviction for possession of a deadly or dangerous weapon.

(a) *The murder*

On the evening of May 6, 2011, Michael David visited Barragan's restaurant, located on the south side of Sunset Boulevard near Echo Park Avenue, in Los Angeles. While there, David chatted and had drinks with Michelle Langarica and Aye Aye Soe, with whom he was not previously acquainted. David was wearing a Bob Marley T-shirt. As the evening progressed, David and the two women left Barragan's and walked to the nearby Gold Room and Short Stop bars, located nearby on Sunset.

That same evening, Ramirez drove Lopez, Cardona, Sardaryan, and Medina to Echo Park to visit bars in the area. Ramirez parked his Toyota 4Runner on Laveta Terrace, just north of the street's intersection with Sunset Boulevard, approximately one block east of Echo Park Avenue. The Lot 1 Café was located on the corner of Sunset and Laveta Terrace, and Barragan's was just across the street on Sunset's south side.

Ramirez's group headed to Little Joy bar. Upon discovering that Medina could not enter because of her age, she, Ramirez, Cardona, and Sardaryan went on to the Gold Room. Lopez remained at Little Joy.

En route to the Gold Room, Ramirez's group encountered David, Langarica, and Soe walking on Sunset. Cardona complimented David on his Bob Marley T-shirt. David replied,

" 'Oh, cool.' " The encounter was friendly and brief. Ramirez's group continued on to the Gold Room, while David's group continued on to Short Stop.

Shortly before 12:30 a.m., Ramirez's group left the Gold Room and set out for his 4Runner. Lopez met them on the way. As Ramirez's quintet walked on Sunset, they again encountered David, Langarica and Soe near Barragan's. Cardona stopped and spoke to David again; Ramirez, Sardaryan, Lopez, and Medina kept walking down Sunset. David said to Cardona, " 'What's up, homeboy,' " " 'What's up homie,' " or similar words. This offended Cardona, who thought David was mocking him and believed Langarica and Soe laughed at the greeting. Angry, Cardona replied, " 'I'm not your homeboy' " or " 'I'm not your homie.' " Cardona pushed David and the two men verbally argued. Cardona adopted an aggressive fighting stance and called David a "bitch."

Within five seconds, Lopez hastened back to where Cardona and David were standing, and joined the argument. After a few seconds, Lopez "sucker-punch[ed]" David.[3] According to Cardona, in response David called Cardona a "fat motherfucker." David backed away, turned, and ran across Sunset. Cardona pursued him. Sardaryan—who had until that point been waiting down the street—ran toward Cardona, arriving just as David was running across the street. Cardona and Sardaryan pursued David; after a moment, Lopez followed. As he ran, Sardaryan carried a small folding knife, with the blade extended.

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[3] A "sucker punch" is a punch thrown when the victim is not expecting it.

Cardona gave up the chase when he reached the corner of Echo Park Avenue and Sunset. Lopez and Sardaryan continued the pursuit. Within a few seconds Lopez outpaced Sardaryan, who slowed or stopped. When David was in the intersection of Echo Park and Sunset Boulevards, Lopez—who was between a few feet and 15 feet away from him—pulled a gun from his waistband, extended his arm, and fired a single shot, hitting David in the back. David fell to the ground, called for help, got back up, and continued running west to the intersection of Sunset and Logan, where he collapsed. According to bystander Ramiro Cisneros, during the chase the shooter yelled at David, threatening to kill him. Several bystanders, including Cisneros and bicyclist Priscilla Barreras, attempted to assist David.

After the shot was fired, Ramirez and Medina—who had not joined the argument or the chase—returned to the 4Runner. Cardona arrived at the 4Runner shortly thereafter.

Numerous bystanders were in the vicinity. One group of six persons, out to celebrate a birthday, quickly retreated into the Lot 1 Café, where the proprietor, Jason Payne, was locking up for the evening. Seconds later Lopez and Sardaryan ran to the café, arriving just as Payne managed to close the establishment's front accordion gate. Sardaryan, still armed with the knife, and Lopez rattled the gate and attempted to enter the café. Lopez or Sardaryan had a gun in his waistband. Sardaryan made a clumsy attempt to stab Payne through the accordion gate's openings, mumbled something Payne could not understand, and dropped the knife. According to Cardona, either Lopez or Sardaryan told the people in the café, " 'If anybody says anything, I'll kill you and your whole family.' " Lopez and Sardaryan returned to the 4Runner.

Ramirez drove the group from the scene. Cardona asked, " 'Why did you shoot him?' " Lopez replied, " 'I shot him.' "

(b) *The investigation*

The gunshot wound to David's back proved fatal.

Video footage retrieved from nearby establishments recorded, from a distance, the altercation between Cardona, David, and Lopez, and depicted a portion of the chase. The gunshot itself was not captured on video.

Video footage also showed Sardaryan, Cardona, Ramirez, and Medina arriving at and leaving the Gold Room. Sardaryan and Cardona were both wearing baseball caps. Cardona wore a light-colored shirt; Sardaryan wore a light or gray long-sleeved shirt. Cardona also wore a backpack. Other video footage showed Lopez walking on Sunset Boulevard, wearing a dark or black T shirt, and no hat. Cardona was the largest of the men, at approximately six feet tall, weighing 250 pounds; witnesses consistently described him as the "big" or "chubby" guy. Both Sardaryan and Lopez were shorter and thinner than Cardona, and Lopez was taller than Sardaryan. Sardaryan, who weighed 120 pounds, was described as small and skinny.

Cardona was arrested several days after the murder. He gave a statement to the district attorney, detailing the incident and his role in it. He subsequently pled guilty to voluntary manslaughter and admitted gang allegations, in exchange for a prison term of 17 years, with the requirement that he truthfully testify in the instant matter and in another gang-related murder case.

Ramirez testified pursuant to a grant of immunity.

Sardaryan, who had moved to Las Vegas with Medina, was arrested in July 2011. There was FTW graffiti near his house.

Lopez fled to Mexico. He was arrested by Mexican officials, and returned to Los Angeles on July 22, 2014.

Trial commenced in September 2015. Cardona and Ramirez testified that Lopez was the shooter. Soe identified Cardona and Lopez as the perpetrators in pretrial photographic lineups. She stated that Lopez was the first man who came to assist Cardona. She also identified Lopez and Sardaryan at trial.[4] Eyewitness Crystle Garcia testified that the shooter was the individual who wore the black T-shirt, i.e., Lopez. Eyewitnesses Jorge Alvarez and Barreras stated that the shooter had a medium or athletic build, which was consistent with Lopez's appearance, not Sardaryan's. Other witnesses' testimony was inconsistent regarding the shooter's attire or build.

(c) *Gang evidence*

Los Angeles Police Department (L.A.P.D.) Officer Hector Cortez, who had extensive training and experience regarding gangs, testified as the People's gang expert. He had been a peace officer for approximately seven years. During his probationary period with the L.A.P.D., Cortez worked in the Northeast Division that monitored the FTW gang. In 2013, he was assigned to the Northeast Division's gang enforcement detail, where he monitored the FTW gang.

FTW began as a "tagging crew,"[5] but the L.A.P.D. recognized the group as a criminal street gang in 2000. In 2011, FTW had approximately 50 members, including both Lopez and Sardaryan. The gang had a distinctive hand sign and used FTW,

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[4] Soe told police that she believed Cardona was the shooter.

[5] A "tagging crew" is a group whose activities are generally limited to "tagging" walls with their own names or activities.

or variations of those letters, in its graffiti. Members commonly had tattoos reading "FTW" or "Fuck The World." An individual who associated with FTW gang members would not have such a tattoo unless he was an FTW member. FTW's territory was bordered by Sunset Boulevard to the south, Lemoyne Street to the east, Mohawk Street to the west, and Riverside Drive to the north. The gang had several rivals, including the Echo Park Locos. The area where the murder occurred was an Echo Park Locos "stronghold." Cortez testified regarding three "predicate" offenses committed by FTW members, and opined that the gang's primary activities included vandalism, robbery, stealing cars, murder, and attempted murder.

Cortez explained how persons join a gang, the gang hierarchy, and the importance of fear, respect, and reputation in the gang culture. The commission of brazen crimes out in the open intimidates the community and discourages cooperation with police, thereby making it easier for a gang to commit crimes with impunity. A gang must stand up to other gangs and commit violent acts in order to retain the respect of their rivals; otherwise, rivals will take over the gang's territory. Testifying in court or cooperating with police is not tolerated and is likely to provoke violent retaliation. If one gang member observes another gang member involved in an argument or an altercation, it is almost mandatory for the second gang member to assist the first; if he failed to do so, he would be "check[ed]" by the gang, i.e., beaten up or even killed.

When given a hypothetical derived from the evidence in the case, Cortez opined that the murder was committed for the benefit of and in association with the gang. The gang as a whole would benefit because community members would be intimidated

and unwilling to cooperate with police, making it easier for the gang to commit future crimes. News of the murder would be spread by word of mouth. Because the victim was not himself a gang member, community members were likely to be even more frightened. Committing a crime in a rival gang's territory benefits the gang because it communicates a lack of respect for the other gang's territory. The crime was committed in association with a gang because gang members committed it as a group, in accordance with the expectation that they must assist each other when a confrontation occurs.

2. Defense evidence

(a) *Lopez's evidence*

At the preliminary hearing, Soe failed to identify Lopez as one of the perpetrators.

Lopez's grandfather, Jose Valle Alvarez, testified that Lopez came to live with him in Mexico in June 2012, to help him with his business.

Defense investigator Wilson Brown interviewed witnesses and took various measurements of the area near the crime scene.

Jesse Leon testified as a character witness. As discussed more fully below, Leon's testimony was ultimately stricken except insofar as it pertained to investigator Brown's preparation of a witness statement.

(b) *Sardaryan's evidence*

Sardaryan testified on his own behalf. As relevant here, he admitted he was a member of FTW from 2009—2010, during which time he and other FTW members painted graffiti murals. He drank heavily during the evening of the murder, and was intoxicated. When Cardona spoke to David en route back to the 4Runner, Sardaryan continued walking. He heard someone yell

and ran back to Cardona "to see what was going on." By the time he caught up, Cardona was already running, and Sardaryan followed. He stopped when he saw that Cardona was no longer next to him. He turned to see where Cardona was, and heard a gunshot. He froze, panicked, and ran; the next thing he remembered, he was in the 4Runner. He did not have a gun with him that night, but did have a pocket knife; however, he did not pull it out or threaten David with it. He had no contact with David that evening, and had no idea that "anybody had anything in their minds to do" anything to him.

A forensic toxicologist testified regarding the effects of alcohol on a person of Sardaryan's size.

Gang expert Martin Flores testified regarding FTW and gang culture in general. Among other things, Flores acknowledged that FTW met the legal definition of a criminal street gang, but in his opinion the group was only a "tagging crew." FTW's primary focus in 2011 was graffiti. Street gangs are more violent and territorial, whereas tagging crews are known for "massive graffiti throughout different boundaries." There was "plenty of documentation" showing FTW graffiti on billboards in the Echo Park area. Flores opined that gaining respect and instilling fear was crucial to only a small percentage of gang members. Neither gang nor tagging crew members "chalk up points" by killing non-gang members. While gang members are sometimes required to assist other gang members, this was less likely for a tagging crew. When given a hypothetical mirroring the facts of the case, Flores opined that the crime was not committed for the benefit of a criminal street gang, but arose out of a personal dispute.

B. Procedure

A jury acquitted Lopez and Sardaryan of first degree murder, but convicted them of the second degree murder of David (§ 187, subd. (a));[6] it additionally found Lopez guilty of being a felon in possession of a firearm (former § 12021, subd. (a)(1)). The jury further found that Lopez, and a principal, personally and intentionally discharged a firearm, causing David's death (§ 12022.53, subds. (d), (e)(1)), and that the murder was committed for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)(1)(C)). The trial court denied Lopez's motion for a new trial. It sentenced him to 15 years to life for the murder, a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), and a consecutive two-year term for violation of former section 12021, subdivision (a)(1), for a total of 40 years to life, plus two years. It imposed a restitution fine, a suspended parole revocation restitution fine, a criminal conviction assessment, and a court operations assessment, and ordered him to pay victim restitution in an amount to be determined at a subsequent hearing. Lopez timely appealed the judgment.

DISCUSSION

A. Ineffective Assistance of Counsel

Lopez contends that his trial counsel provided ineffective assistance in a variety of respects related to the defense investigator, Brown, and to character witness Leon.

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[6] Sardaryan is also a party to this appeal. However, at his request, we stayed his appeal to allow him to petition for vacation of his conviction and resentencing in the trial court pursuant to section 1170.95. (See *People v. Martinez* (2019) 31 Cal.App.5th 719.)

1. Additional facts

(a) *Pretrial discussions*

On September 24, 2015, during jury selection, defense counsel, Eber Bayona, complained to the trial court about the conduct of the prosecutor, Hubert Yun, regarding character witness Leon. In turn, Yun complained to the court about an error in a defense report prepared by investigator Brown.

As variously explained by Bayona, Yun, or Brown, the facts were as follows. Leon had previously interned for the district attorney's office, and at the time of trial, was working for a Los Angeles city councilmember. Both Bayona and Lopez's mother knew Leon. Bayona spoke to Leon, who agreed to testify as a character witness.

Brown prepared a witness report on Leon, and Bayona transmitted it to the prosecution. The report stated that Brown telephonically interviewed Leon on September 15, 2015. In fact, Brown explained to the trial court, this was an error. For the sake of expediency, Brown had prepared a draft report based on information provided by a third party, in anticipation of confirming the information in his eventual interview with Leon. However, he inadvertently signed and faxed the draft report to Bayona's office. Brown did interview Leon on September 23, 2015, and Leon confirmed that all the information contained in the report was accurate. Brown thereafter submitted a corrected report, changing only the date of the interview.

The record does not contain a copy of the report, but from the parties' comments and Leon's eventual trial testimony it is apparent the report stated that Lopez attended a youth camp at which Leon served as a counselor; based on Leon's knowledge of

Lopez at that time, Leon did not believe Lopez was violent; and Leon's last contact with Lopez occurred in approximately 2007.

After receiving the erroneous report, Yun performed a background check on Leon, and, on September 23, 2015, went to Leon's office, left a business card, and then telephoned Leon. According to Bayona, in that call Yun asked Leon, " 'Didn't you receive the Latino prosecutor's award from our office? What are your career aspirations? You want to be a prosecutor?' " Yun also asked how Leon could testify to Lopez's nonviolent character, given that Lopez "has a gun charge." Leon was offended and felt that his testimony might tarnish his reputation with the district attorney's office. Bayona contacted Yun's supervisor to discuss Yun's behavior.

Yun did not deny commenting on the award Leon had received or asking about Leon's career aspirations. Yun advised Leon that he should review Brown's report for accuracy. Yun emailed the report to Leon, who confirmed the information contained therein was truthful, but stated that Bayona, not Brown, had interviewed him.[7] Yun denied threatening Leon.

The trial court advised that both parties could address "any pressure on [Leon] in testifying," as well as the accuracy of Brown's report. The court cautioned the attorneys against allowing their examinations to devolve into personal attacks; observed that character witnesses could testify only if they had relevant information; and admonished Brown that reports should not be based on hearsay. Yun indicated he intended to cross-examine Brown about the first, erroneous report.

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[7] Bayona stated that although he had known Leon for years, he did not interview him.

(b) *Leon's testimony regarding his acquaintance with Lopez*

At trial, Leon testified that he had known Lopez for many years due to their mutual involvement with the Downtown YMCA. Leon had worked for the YMCA at week-long summer camps Lopez attended in 2003 through 2006, and also worked with Lopez in a YMCA leadership development program. Leon had not seen Lopez since approximately 2007, although he had become close to, and stayed in touch with, the Lopez family. Based on his knowledge of Lopez through 2007, he did not believe Lopez was a violent person.

At sidebar discussions, the prosecutor asked that Leon's testimony be stricken as irrelevant. The trial court agreed the testimony was "totally irrelevant" because it did not relate to the relevant time frame or a particular character trait. Yun argued that if the testimony was not stricken, he should be allowed to ask whether Leon had heard of Lopez's conviction on a "gun charge." The court gave defense counsel the option of having the testimony stricken, or retaining it but allowing Yun to inquire about Leon's knowledge of Lopez's gun-related conviction. Defense counsel agreed that the testimony be stricken.

(c) *Trial testimony about the erroneous report*

Leon testified that when he learned of investigator Brown's erroneous report, he was "extremely upset" and concerned about the appearance of falsehood. He read the report, however, and "agree[d] with the facts in the statement 100 percent." Leon confirmed that while he did not speak to Brown on the telephone on September 15, 2015, he did talk to Brown thereafter. Bayona interviewed him before trial. Leon did not speak to anyone besides Brown and Bayona about the case.

Brown testified consistently with his earlier explanation to the court. He also testified that he obtained the information for the draft report based on information he gained from Lopez's mother, during a meeting with Lopez's mother and Bayona.

(d) *Lopez's grandfather's testimony*

The defense called Lopez's 82-year-old grandfather, Alvarez, to establish that Lopez left for Mexico after the murder because Alvarez needed help with his business, a tortilla bakery. The prosecutor elicited from Alvarez that when Brown interviewed him, Lopez's mother acted as a translator. Brown testified that Lopez's mother translated because Alvarez spoke little English. Brown's report did not include the fact that the mother translated.

(e) *Testimony regarding photographs and measurements*

Brown testified regarding measurements and photographs he took of the area of Sunset Boulevard and Laveta Terrace, including the Lot 1 Café. Among other things, Brown testified that he parked his personal vehicle, a mid-sized SUV comparable to a 4Runner, on the west side of Laveta Terrace four spaces up from Sunset, facing south. From that vantage point, Brown could see the café's western wall, but not the doorway. Photographs depicted the view from the vehicle to the Lot 1 Café, showing that the café's front accordion gate was not visible from that vantage point and that the approximate distance between the door and the vehicle was 100 feet.

(f) *Closing arguments*

During closing, Bayona argued that certain portions of a witness interview, during which the witness was shown a videotape, should have been recorded. In response, the

prosecutor argued that Brown had failed to record any of the defense interviews, and "apparently he's in the practice of writing reports before interviewing witnesses" and was "manufacturing witness statements . . . ." The prosecutor also criticized Brown's decision to measure the distance to the Lot 1 Café from the fourth parking space on Laveta Terrace, rather than the second parking space, where Ramirez testified he parked. The prosecutor urged that this showed the defense was "trying to pull the wool over your eyes."

2. Lopez has failed to establish ineffective assistance

Lopez criticizes defense counsel's representation as it related to Brown and Leon. He urges that counsel failed to adequately supervise Brown and should not have called him as a witness in light of the erroneous date on the Leon report, the contradictory testimony about where Brown initially obtained the information in the report, and Brown's failure to disclose, in the Alvarez report, that Lopez's mother acted as translator. These aspects of Brown's conduct, he avers, undercut the credibility of the defense case. Moreover, he insists, Brown should have measured the distance between the Lot 1 Café to the second parking spot up Laveta Terrace—where Ramirez testified he parked—rather than from the fourth spot, a decision that left his investigation open to attack. Lopez insists that Brown's testimony regarding the measurements was "tangential, at best" and "could easily have been offered by another investigator." Lopez avers that Brown's performance "cast a pall of incredibility and deception over the entire defense team." And, Lopez contends that counsel should have objected to the prosecutor's questioning of Brown on the false report issue, which was

irrelevant, unduly prejudicial, and should have been excluded under Evidence Code section 352.

Defense counsel further erred, in Lopez's view, by calling Leon as a witness. He argues that Leon had no relevant character evidence to offer; his testimony was ultimately stricken; and he "implicated defense counsel in the investigator's deception."

(a) *Applicable legal principles*

A meritorious claim of constitutionally ineffective assistance must establish both that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that the defendant was prejudiced by counsel's failings. (*People v. Johnson* (2016) 62 Cal.4th 600, 653; *Strickland v. Washington* (1984) 466 U.S. 668, 687—688.*)* If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) " 'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Johnson*, at p. 653.) Our review of counsel's performance is highly deferential. (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) We defer to counsel's reasonable tactical decisions, and presume counsel's actions can be explained as a matter of sound trial strategy. (*People v. Mai* (2013) 57 Cal.4th 986, 1009; *People v. Gamache*, at p. 391.) Counsel "has wide discretion in choosing the means by which to provide constitutionally adequate representation." (*People v. Johnson*, at

p. 653.) To establish prejudice, "defendant bears the burden to show a reasonable probability that, but for his trial counsel's errors, the result would have been different. [Citation.] A reasonable probability is one ' "sufficient to undermine confidence in the outcome." ' [Citation.]" (*People v. Olivas* (2016) 248 Cal.App.4th 758, 770.)

(b) *Application here*

Defense counsel was clearly aware of the ramifications of calling Brown and Leon as witnesses, given the parties' pretrial discussions. Thus, it is clear counsel made a tactical choice to call Brown and Leon.

Lopez fails to demonstrate that counsel's tactical choices in regard to Brown were objectively unreasonable. Brown's testimony about the measurements and photographs was not, as Lopez suggests, insignificant, nor was Brown's choice to photograph and measure from four parking spaces up Laveta Terrace unreasonable. Ramirez testified that he parked his 4Runner approximately two car lengths north of Sunset on Laveta Terrace, but Cardona testified that the vehicle was parked approximately four or five spaces north from the corner. Cardona testified that he could see, from his vantage point seated in the 4Runner's front passenger seat, Lopez directly in front of the Lot 1 Café, with a gun in his hand, and could hear Lopez or Sardaryan threaten to kill the people inside the café if "anybody says anything." No other witness testified to hearing this threat. Brown's testimony—that from the vantage point Cardona described, the café's front gate was not visible and was 100 feet away—tended to undermine Cardona's account.[8] Indeed, during

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[8] Brown misspoke when he testified that he parked his vehicle four car spaces up "to demonstrate the position that

closing argument, relying on Brown's testimony, counsel contended it was unbelievable that Cardona, who was 100 feet away, heard a threat to the persons in the café when Payne, who was at the café gate, did not. Counsel also urged, based on the measurements taken by Brown, that Ramirez was too far away to have seen Lopez punch the victim. Counsel's attempt to discredit Cardona and Ramirez was a reasonable trial tactic; their testimony was crucial to the People's case. Counsel could reasonably have concluded that a new investigator was not necessary because, as we explain *post*, evidence about Brown's errors was unlikely to matter to the jury.

Even assuming arguendo that counsel unwisely called Leon and Brown as witnesses, and erred by failing to object to the prosecutor's cross-examination of Brown, no prejudice is apparent. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 697 [if it is easier to dispose of an ineffective assistance claim on the ground of lack of prejudice, that course should be followed]; *In re Cox* (2003) 30 Cal.4th 974, 1019—1020.) First, the issues with Brown's investigation were not nearly as egregious or important as Lopez suggests. The fact Brown omitted from his report that Lopez's mother translated the conversation between Brown and Lopez's grandfather is unlikely to have had any impact on the jury. Common sense suggests that a translated conversation is still a conversation between the parties. Reasonable jurors would not have assumed Brown's omission of the translator's assistance was dishonest, especially given that

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witness Ramirez had indicated he was sitting in the fourth car back," but this was inconsequential in light of the fact that Cardona did so testify.

there was no controversy about the accuracy of the translation or the content of the conversation. Indeed, the trial court opined that the prosecutor was "sort of splitting hairs here."

Similarly, we find it inconceivable that the jury gave significant weight to Brown's error in regard to the Leon report. Brown's explanation was plausible, and it was undisputed that he did eventually interview Leon. The report pertained not to the crime itself, but to Lopez's attendance at YMCA camps as a youth and his character at that time. Most significantly, it was undisputed that all the information in the report was accurate. Thus, regardless of whether Brown originally gleaned the information from Bayona or from Lopez's mother, jurors could not have concluded Brown was attempting to manufacture favorable evidence for the defense. While we of course do not condone Brown's error, there is no chance reasonable jurors would have concluded it cast doubt on the defense team or showed the investigator was unscrupulous, as Lopez argues. Although the prosecutor appeared to be enamored of the evidence, we doubt that the jury paid it much, if any, heed.

The portion of Leon's testimony regarding Lopez's camp attendance was stricken, and therefore we presume the jury did not consider it. (See *People v. Johnson* (2018) 6 Cal.5th 541, 589 [we presume jurors follow the trial court's instructions]; *People v. Homick* (2012) 55 Cal.4th 816, 866–867.) The trial court explained, inter alia, the "time frame" made the testimony too attenuated to be relevant. Accordingly, jurors would not have drawn negative implications from the fact the testimony was stricken. And, by agreeing that the testimony should be stricken, defense counsel ultimately precluded the jury from learning of the nature of Lopez's prior gun-related conviction.

Furthermore, the People's case was extremely strong. Cardona and Ramirez provided compelling testimony showing Lopez was the shooter. There was no dispute that Cardona, Lopez, and Sardaryan chased David; all but one witness testified to seeing three men chasing him, and a videotape of the confrontation showed Cardona, Lopez, and Sardaryan pursuing him. While the witnesses were inconsistent in their descriptions of the shooter's clothing and size, they were almost uniform in their observations that the "big guy"—i.e., Cardona—stopped running at the corner, before the shot was fired, meaning either Lopez or Sardaryan was necessarily the shooter. There was overwhelming evidence that Cardona, Lopez, and Sardaryan were FTW gang members, and that Cardona was incensed because David called him "homie" or "homeboy." Nothing about the challenged evidence was likely to influence the jury's consideration of the gang enhancement or of its determination of whether Lopez or Sardaryan was the actual shooter. In short, juxtaposed against the People's evidence, it is inconceivable that the minor issues with Brown's investigation, and Leon's stricken testimony, had any impact on the jury's verdict.

B. Contentions Related to the Gang Enhancements

Lopez contends the evidence was insufficient to prove the elements of the section 186.22, subdivision (b) gang enhancement, and the trial court erred by failing to sua sponte instruct the jury on the definition of the phrase "in association with any criminal street gang." These contentions lack merit.

1. Sufficiency of the evidence

(a) *Applicable legal principles*

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record

in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*); *People v. Livingston* (2012) 53 Cal.4th 1145, 1170.)

Section 186.22, subdivision (b)(1), provides for a sentence enhancement when the defendant is convicted of enumerated felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." A criminal street gang is statutorily defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f); *People v. Garcia* (2017) 9 Cal.App.5th 364, 375; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) It is well settled that a trier of fact may rely on expert testimony to reach a finding on a gang allegation. (*People*

v. Garcia, at pp. 375–376.) Such testimony may be sufficient to support a true finding on the enhancement. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Weddington* (2016) 246 Cal.App.4th 468, 483.)

(b) *Sufficiency of the evidence to prove the predicate offenses*

Lopez contends the evidence was insufficient to prove the requisite pattern of criminal gang activity because the People failed to prove the predicate offenses were gang related.[9]

For purposes of section 186.22, subdivision (e), " ' "pattern of criminal gang activity" ' means 'the commission of . . . or conviction of two or more of [certain enumerated offenses]' that 'were committed on separate occasions, or by two or more persons.' " (*People v. Garcia*, *supra*, 9 Cal.App.5th at p. 375; § 186.22, subd. (e); *People v. Lara* (2017) 9 Cal.App.5th 296, 326; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1457.) The charged crime may serve as one of these so-called predicate offenses, as can evidence of another offense committed on the same occasion by a fellow gang member. (*People v. Duran*, at p. 1457; *People v. Miranda* (2016) 2 Cal.App.5th 829, 840; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400.)

Here, there was evidence of at least three predicate offenses. The People presented certified copies of convictions suffered by Antonio de Jesus Gonzalez and Adolfo Campos for attempted voluntary manslaughter in September 2009 and grand theft auto, with a prior, in February 2010, respectively. Gang expert Cortez testified Gonzales and Campos were members of

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[9] Because Lopez joins in and relies upon Sardaryan's briefing in support of this contention, for ease of reference we attribute arguments made in Sardaryan's brief to Lopez.

FTW. Cardona admitted suffering a conviction for the 2007 robbery of a rival gang member. The prosecutor offered a certified copy of Cardona's conviction, and indicated he was relying on the conviction as a predicate offense.

This evidence sufficiently established the pattern of criminal gang activity. Grand theft, manslaughter, and robbery are all offenses that qualify as predicates. (§ 186.22, subds. (e)(2), (3), (9).) The crimes were committed within the statutorily mandated time frame, on separate occasions. And certified court records are admissible as official records to prove both the fact of a conviction and the commission of the underlying offense. (*People v. Duran*, *supra*, 97 Cal.App.4th at pp. 1460–1461.)

Lopez's insufficiency argument rests primarily on his interpretation of the statutory language and of three authorities: *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), overruled on another ground by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13; *People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*); and *People v. Augborne* (2002) 104 Cal.App.4th 362 (*Augborne*).

As relevant here, *Gardeley* considered and expressly rejected the contention Lopez makes, i.e., that "predicate offenses by gang members can establish a 'pattern of criminal gang activity' only if each such offense is shown to be 'gang related,' " that is, committed for the benefit of, at the direction of, or in association with, a criminal street gang.[10] (*Gardeley*, *supra*,

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[10] *Gardeley* also considered issues related to an expert's reliance on hearsay. *People v. Sanchez*, *supra*, 63 Cal.4th 665, disapproved *Gardeley* "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*People v. Sanchez*, at p. 686,

14 Cal.4th at pp. 610, 621.) *Gardeley* examined the statutory language and found it clear and unambiguous. (*Id.* at p. 621.) Nothing therein required the predicates to have been gang related, and the court refused to read such an additional element into the law. (*Ibid.*) The court concluded: "We disagree that the predicate offenses must be 'gang related.' " (*Gardeley*, at pp. 610, 622–623.)

Sengpadychith considered the primary activities element of section 186.22, not the pattern of criminal gang activity element. (See *Sengpadychith*, *supra*, 26 Cal.4th at pp. 320, 322.) The question before the court was: "May the jury consider the circumstances of the charged crimes on the issue of the group's primary activities?"[11] (*Id.* at p. 320.) The court concluded it could, reasoning: "Nothing in [the] statutory language prohibits the trier of fact from considering the circumstances of the *present* or charged offense in deciding whether the group has as one of its primary activities the commission of one or more of the statutorily listed crimes." (*Id.* at pp. 320, 323.) However, the evidence must also show the group's members consistently and repeatedly committed criminal activities; occasional commission of crimes is insufficient. (*Id.* at pp. 323–324.)

In *Augborne*, the court considered whether the perpetrator of a predicate offense had to be a gang member when he or she committed the predicate. (*Augborne*, *supra*, 104 Cal.App.4th at p. 366.) *Augborne* said no: "Based on the express language of

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fn. 13.) Lopez expressly declines to argue that proof of the predicates was based on testimonial hearsay.

[11] *Sengpadychith* also considered an instructional error issue that is not germane to Lopez's contentions.

section 186.22, subdivisions (b), (e), and (f) and the analysis in a closely related context in [*Gardeley*], we conclude that the prosecutor has no duty to prove that the persons perpetrating the predicate offenses were gang members when the enumerated crimes were committed." (*Id.* at p. 366.) The court further reasoned: "*Gardeley* holds that predicate offenses need not have been committed for the benefit of, at the direction of, or in association with the gang. It reasonably follows then that the prosecutor need not demonstrate that the two or more individuals who committed the predicate crimes were gang members *at the time* the offenses were committed." (*Id.* at p. 375.)

Lopez requests that we "reconsider *Augborne*" and hold that "a crime committed previously by a member of FTW does not establish a pattern of criminal activity" unless "the predicate was itself a gang crime." He contends that the *Augborne* court erroneously conflated consideration of the primary activities and pattern of criminal activity elements. In his reply brief, Lopez seems to argue that to qualify as predicates, the prior offenses must be either gang related or committed by persons who were FTW members at the time. Elsewhere in his briefing, Lopez appears to agree that the perpetrator of a predicate crime need not have been a gang member at the time the predicate was committed, and acknowledges that predicates need not "have gang enhancements attached to them."

While Lopez asks that we "reconsider" *Augborne*, in fact it is *Gardeley* that fatally undermines his contention that a predicate must be gang related. As noted, *Gardeley* considered the statutory language and expressly found there was no requirement that the prosecution prove the predicates were gang related. (*Gardeley*, *supra*, 14 Cal.4th at pp. 610, 621.) We are

bound to follow *Gardeley*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Lopez attempts to avoid this conclusion by arguing that *Gardeley* has been superseded by *Sengpadychith*, in that there is "an obvious conflict between *Sengpadychith*'s exclusion of the occasional commission of . . . crimes by the group's members and the conclusion in *Gardeley* that predicates need not be gang crimes." But *Sengpadychith* addressed the primary activities element of the enhancement. The cited portion of *Gardeley* addressed the pattern of criminal activity element. There is no conflict between the opinions, obvious or otherwise. Moreover, *Sengpadychith* mentioned *Gardeley* in its analysis, but gave no hint that its holding cast doubt on *Gardeley*.

As to *Augborne*, we detect no flawed reasoning. In the portion of *Augborne* Lopez cites, the court was explaining that the evidence supported the *other* elements of the gang enhancement, not conflating the pattern and primary activities elements. (*Augborne*, *supra*, 104 Cal.App.4th at pp. 372–373.) In fact, Lopez appears to agree with *Augborne*'s conclusion that the perpetrator of a predicate need not have been a gang member at the time he or she committed the offense. In any event, here the People offered sufficient evidence to prove that Cardona, Gonzalez, and Campos *were* FTW members when they committed the predicates. Gang expert Cortez testified to Gonzalez's and Campos's FTW membership, and Cardona admitted committing his prior robbery with a group of FTW members in retaliation for another shooting. The evidence was sufficient.

(c) *Sufficiency of the evidence to prove the gang's primary activities*

Next, Lopez argues that the People failed to present evidence sufficient to establish the "primary activities" element of the gang enhancement.

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.]" (*Sengpadychith*, *supra*, 26 Cal.4th at p. 323; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1464.) "Proof that a gang's members consistently and repeatedly have committed criminal activity listed in section 186.22, subdivision (e) is sufficient to establish the gang's primary activities. On the other hand, proof of only the occasional commission of crimes by the gang's members is insufficient." (*People v. Duran*, at pp. 1464–1465; *Sengpadychith*, at pp. 323–324.) Past offenses, as well as the circumstances of the charged crime, may tend to prove the group's primary activities. (*Sengpadychith*, at p. 323; *People v. Duran*, *supra*, at p. 1465.) It is settled that the primary activities element may be established by expert testimony. (*Sengpadychith*, at p. 324; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1226; *People v. Duran*, at p. 1465.)

Here, gang expert Cortez testified that FTW's primary activities were vandalism, robbery, stealing cars, murder, and attempted murder. These offenses are qualifying crimes for the primary activities element of section 186.22. (See § 186.22, subds. (e)(2), (3), (20) & (25).) Cortez's opinion was based upon his conversations with other officers, his personal contacts with gang members, his own experience investigating FTW crimes,

and his review of crime reports. This expert testimony was, by itself, sufficient to prove the primary activities element. "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran*, *supra*, 97 Cal.App.4th at p. 1465; *Sengpadychith*, *supra*, 26 Cal.4th at p. 324.)

Sengpadychith observed, for example, that the expert testimony in *People v. Gardeley*, *supra*, 14 Cal.4th 605, was sufficient: "There, a police gang expert testified that [the defendant's gang] was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citations.] The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (*Sengpadychith*, *supra*, 26 Cal.4th at p. 324; see also *People v. Martinez* (2008) 158 Cal.App.4th 1324,1330 [gang expert's specific testimony that gang's primary activities included robbery, assault, theft and vandalism was sufficient to prove primary activities element in light of expert's training and experience]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107 [expert's testimony that gang's activities ranged from vandalism and battery, carjackings, weapons offenses, robberies, and murder, was sufficient]; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 207 [primary activities element proved by expert's testimony that gang "engaged in several of the crimes listed in section

186.22 as a primary activity," where he had personally investigated cases involving those offenses, talked to gang members about gang's activities, and testified to the two predicate offenses].)

In addition to Cortez's testimony, there was evidence of four specific examples of the gang's primary activities. The jury could consider the two predicates committed by Campos and Gonzalez, plus Cardona's prior robbery. The jury could also rely on the charged murder of David as evidence of the gang's primary activities, evidence which was consistent with Cortez's testimony. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 323; *People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1330.) And, there was considerable testimony supporting Cortez's opinion that vandalism was another of the gang's primary activities. Defense expert Flores testified that in 2011, FTW's primary focus was graffiti; that tagging crews are known for "massive graffiti throughout different boundaries;" and that there was "plenty of documentation" showing FTW graffiti on billboards in Echo Park. Sardaryan testified that when he was an FTW member from 2009—2010, he and other gang members would "go out and do murals" with "FTW" on them. Especially because of the gang's small size—20 to 30 members, according to Cardona, and 50 according to Cortez—this evidence, coupled with the expert testimony, was sufficient to show more than just occasional commission of qualifying offenses.

Lopez argues Cortez's testimony was inadequate because Cortez did not work in the Northeast division, which covered the FTW gang, in 2011. Essentially, Lopez argues that Cortez lacked sufficient personal knowledge to opine about FTW as it existed in 2011, when the murder occurred.

We disagree. Cortez worked in the Northeast Division (which monitored FTW's activities) during his probationary period with the L.A.P.D. He had been assigned to monitor FTW as part of the L.A.P.D.'s Northeast gang enforcement detail for the three years preceding trial. He had "spoken to the officers who worked the gang before" he was assigned to monitor it, and learned from them that FTW had been actively committing crimes.[12] He had frequent contacts with gang members, including FTW members, in which he discussed, among other things, "their previous convictions or arrests." This evidence showed Cortez had sufficient knowledge of the gang as it existed in 2011.

Lopez relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605, for the proposition that Cortez's testimony was too conclusory, and that the People must show more than the minimum two predicate offenses in order to establish the primary activities element. In *Alexander L.*, the defendant allegedly committed vandalism based on his "tagging" activities. When asked about the gang's primary activities, the expert testified, " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in

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[12] It remains true after *People v. Sanchez* that a gang expert may rely on hearsay, including conversations with other officers, in forming an opinion. (See *People v. Sanchez*, *supra*, 63 Cal.4th at pp. 685–686; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175 [expert may provide general background testimony about gang's primary activities and pattern of criminal activities], review granted Mar. 22, 2017, S239442, opn. ordered to remain precedential; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411–412.)

murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id.* at p. 611.) However, the expert "did not directly testify that criminal activities constituted [the gang's] primary activities." (*Id.* at pp. 611–612.) No further questions were asked about the primary activities, and no specifics were elicited as to the circumstances of the crimes or how the expert obtained the information. The basis for his knowledge of the gang's primary activities was never elicited. (*Id.* at p. 612.)

In contrast to *Alexander*, the foundation for Cortez's opinion was established, i.e., his experience in the field, his discussions with colleagues and gang members, and his training. Also, unlike in *Alexander L.*, Cortez expressly testified that FTW's primary activities included vandalism, robbery, stealing cars, murder, and attempted murder. (See *People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1330 ["*Alexander L.* is different because there the expert never specifically testified about the primary activities of the gang. He merely stated 'he "kn[e]w" that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang's] primary activities' "]; *People v. Margarejo*, *supra*, 162 Cal.App.4th at p. 108 ["The expert testified the gang's primary activities included murder. There was no such testimony in *Alexander L.*"].) Here, the evidence was sufficient.

(d) *Sufficiency of the evidence to prove intent and association*

Next, Lopez argues the evidence was insufficient to establish the murder was gang related.

A gang enhancement applies only when the crime was committed for the benefit of, at the direction of, or in association

with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1197; *People v. Margarejo*, *supra*, 162 Cal.App.4th at p. 108.) Thus, to prove a gang enhancement, the People must show the crime was " ' "gang related." ' " (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1170; *Albillar*, *supra*, 51 Cal.4th at p. 67; *People v. Garcia*, *supra*, 9 Cal.App.5th at p. 379.) "Not every crime committed by gang members is related to a gang." (*Albillar*, at p. 60.) It is " 'conceivable' " that gang members who commit a crime together might " 'be on a frolic and detour unrelated to the gang.' " (*Id.* at p. 62; *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1364.)

(i) *The evidence was sufficient to prove the murder was committed in association with the gang*

Here, the evidence was sufficient to show Lopez committed the murder in association with the FTW gang. *Albillar* is instructive. There, the three defendants—who lived together and were related to each other—committed sexual offenses in concert against a teenage victim. (*Albillar*, *supra*, 51 Cal.4th at pp. 50–51.) Our Supreme Court concluded the evidence was sufficient to show the crimes were committed in association with and for the benefit of a criminal street gang. (*Id.* at pp. 51, 62–63.) A gang expert testified, among other things, that when gang members commit crimes together, their chances of success increase, and gang members could "trust . . . each other's loyalties." (*Id.* at pp. 60–61.) *Albillar* reasoned that the three gang members could rely on each other's cooperation in committing the sexual offenses, observing that "without another word being spoken," two of the men held the victim down while the third raped her. (*Id.* at p. 61.) The defendants "not only actively assisted each

other in committing these crimes, but their common gang membership ensured that they could rely on each other's cooperation." (*Id.* at pp. 61–62.) There was "substantial evidence that defendants came together *as gang members* to attack [the victim] and, thus, that they committed these crimes in association with the gang." (*Id.* at p. 62.)

The same is true here. There was ample evidence establishing that Cardona, Lopez, and Sardaryan were all FTW members, based on their tattoos, as well as on Cardona's, Ramirez's, and Cortez's testimony. Their prominent tattoos demonstrated their commitment to the gang. Our Supreme Court has observed that such tattoos tend to "support[ ] [a] finding that [a] crime committed with fellow gang members was gang related." (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1171; *Albillar*, *supra*, 51 Cal.4th at p. 62 [tattoos indicated defendants' commitment to gang was not superficial, supporting finding attack was gang related].) Murder was one of the crimes Cortez identified as one of FTW's primary activities. (See *People v. Garcia*, *supra*, 9 Cal.App.5th at p. 380 [evidence that charged crimes were identified as one of gang's primary activities supported finding crimes were gang related].)

The jury could reasonably infer the impetus for the crime was gang related. When Cardona first encountered David on the night of the murder, he complimented David's attire, and the interaction was friendly. When Cardona passed David a second time and stopped to talk, David said " 'What's up, homeboy,' " or " 'What's up, homie.' " Cardona felt that David was making fun of him, and replied, " 'I'm not your homeboy' " or " 'I'm not your homie.' " The expert testified that in gang culture, "homie" is a term of endearment. If a non-gang member used the term to a

gang member, the gang member could be offended because he would not want to be connected to the speaker. From the evidence, the jury could infer that Cardona was offended that a non-FTW member implied he was Cardona's associate.

Cortez also opined that the crime was committed in association with the gang because "[i]f one individual gets into a confrontation with a citizen in the street, and . . . some type of physical altercation ensues, in my opinion it is expected for the other gang members to join in and help . . . ." A gang member who fails to do so is subject to physical reprisals from the gang. Consistent with this gang code of behavior—and as in *Albillar*, where the gang members assisted each other "without another word being spoken" (*Albillar*, *supra*, 51 Cal.4th at p. 61)—Lopez rushed to offer his immediate and unquestioning assistance to Cardona as soon as it was apparent Cardona was engaged in a dispute with the victim. Lopez did so even though he had no prior contact with David or personal disagreement with him: Lopez was not present during Cardona's first encounter with David, nor was he there when David called Cardona his "homie." Nonetheless, Lopez and Sardaryan hurried back to Cardona when Cardona began arguing with and pushing David; Lopez "sucker-punched" David; all three FTW members chased him; and Lopez shot and killed him—all because his fellow gang member took offense to a remark. Just as in *Albillar*, the three gang members worked cooperatively to chase, assault, and ultimately murder the victim. As in *Albillar*, the jury could reasonably infer the three FTW members " 'counted on each other's loyalty to be there and [to] back them up.' " (*Ibid.*)

The jury could reasonably infer that Lopez's conduct was most readily explained by his adherence to the gang's internal

code, as described by Cortez. (See *Albillar*, *supra*, 51 Cal.4th at p. 62 [common gang membership ensured gang members could rely on each other's cooperation].) Indeed, in the absence of the men's gang allegiance, Lopez's and Sardaryan's conduct—chasing and attacking an unarmed man, with whom they had no personal beef—is inexplicable. As in *Albillar*, the evidence showed Lopez, Sardaryan, and Cardona "came together *as gang members*" to attack David for purportedly insulting their fellow gang member. (*Ibid.*; see *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1197; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1368–1369 [substantial evidence of association element where gang members relied upon their gang membership in committing robberies; jury could infer they knew they could "count on each other to assist when engaging in crimes of opportunity against victims in their territory"].) Thus, although this was not the "prototypical" drive-by shooting of a rival gang member (see *People v. Livingston*, *supra*, 53 Cal.4th at p. 1171), "[t]he record supported a finding that [appellant and his fellow gang members] relied on their common gang membership and the apparatus of the gang in committing" the murder. (*Albillar*, at p. 60; see *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1261.)

Lopez argues that "the involvement of, and reliance upon . . . non-gang participants, Ramirez and Sardaryan's girlfriend dispels" any inference that the perpetrators acted according to the gang code of conduct. But Ramirez and Medina did *not* participate in the attack on David; they stayed behind when the other three chased and attacked him. Contrary to Lopez's argument, the fact they declined to join in suggests that, because the crime was gang related, only the gang members felt compelled to participate.

Because we conclude the evidence was sufficient to prove Lopez committed the murder in association with the FTW gang, we need not reach the question of whether he also acted to benefit the gang. (See *People v. Garcia*, *supra*, 9 Cal.App.5th at p. 379 [section 186.22, subdivision (b)(1) describes what the prosecution must prove in the disjunctive].)

(ii) *The evidence was sufficient to prove the requisite intent*

Albillar also compels the conclusion that the intent element was satisfied. Rejecting the argument that section "186.22(b)(1) requires the specific intent to promote, further, or assist a *gang-related* crime," (*Albillar*, *supra*, 51 Cal.4th at p. 67), the court reasoned: "The enhancement already requires proof that the defendant commit a gang-related crime in the first prong—i.e., that the defendant be convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang. [Citation.] There is no further requirement that the defendant act with the specific intent to promote, further, or assist a *gang*; the statute requires only the specific intent to promote, further, or assist criminal conduct by *gang members*. [Citations.]" (*Ibid.*) "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Id.* at p. 68.) In *Albillar*, the court concluded "there was ample evidence that defendants intended to attack [the victim], that they assisted each other in raping her, and that they were each members of the criminal street gang. Accordingly, there was substantial evidence that defendants acted with the specific intent to

promote, further, or assist gang members in that criminal conduct." (*Ibid.*)

The same is true here. The evidence showed Lopez knew Cardona and Sardaryan were fellow FTW gang members. He and Sardaryan clearly intended to assist in Cardona's attack on David: after Cardona pushed David, Lopez assisted by "sucker-punching" David, and all three men acted together in chasing David. As in *Albillar*, there was ample evidence Lopez acted with the requisite intent. (*Albillar*, *supra*, 52 Cal.4th at p. 67; see *People v. Livingston*, *supra*, 53 Cal.4th at p. 1171; *People v. Pettie* (2017) 16 Cal.App.5th 23, 50–51; *People v. Weddington*, *supra*, 246 Cal.App.4th at p. 485; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198.)

2. Purported instructional error

Lopez contends that the trial court prejudicially erred by failing to sua sponte define the phrase "in association with a criminal street gang" in the jury instruction pertaining to the gang enhancement. We disagree.

The trial court gave a standard jury instruction on the gang enhancement, CALJIC No. 17.24.2. That instruction defined "criminal street gang," "pattern of criminal gang activity," and "primary activities," but did not define "in association with." Lopez did not request that the trial court provide any additional definition.

Lopez contends that "a technical definition" of the phrase is necessary. He posits that the court's failure to include such a definition rendered the instructions incomplete and allowed the jury to find the gang enhancement true based on an incorrect theory.

"A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel . . . ." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) In the absence of a request for amplification, the language of a statute defining a crime is usually an appropriate and desirable basis for an instruction, as long as the jury would not have difficulty understanding the statute. (*People v. Estrada* (1995) 11 Cal.4th 568, 574; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) " 'If a statutory word or phrase is commonly understood and is not used in a technical sense, the court need not give any sua sponte instruction as to its meaning.' " (*People v. Lucas* (2014) 60 Cal.4th 153, 296, disapproved on another point by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53–54, fn. 19.) On the other hand, a court does have a duty to define terms that have a technical meaning peculiar to the law. A word has a technical legal meaning requiring clarification when its definition differs from its nonlegal meaning. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Cross* (2008) 45 Cal.4th 58, 68.)

Lopez forfeited his contention by failing to request modification or amplification. A party " 'may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 901; *People v. Lee*, *supra*, 51 Cal.4th at p. 638.)

Lopez's contention fails on the merits as well. He relies primarily on retired Justice Werdegar's concurring and dissenting opinion in *People v. Albillar*, *supra*, 51 Cal.4th 47. As discussed *ante*, *Albillar* considered, among other things, whether there was sufficient evidence to support a gang enhancement in a

rape-in-concert case. *Albillar* reasoned that the sex offenses at issue were gang related in two ways: they were committed in association with a gang and for the benefit of the gang. (*Id.* at p. 60.) The majority explained that the crime was committed in association with the gang because the three defendants "relied on their common gang membership and the apparatus of the gang" to commit the sex offenses. (*Ibid.*) Justice Werdegar criticized the majority's "definition" of "in association with" as a misplaced focus on gang members who associate with one another, rather than with the gang. (*Id.* at p. 73 (conc. & dis. opn. of Werdegar, J.).)

Albillar does not support Lopez's contention. A concurrence or dissent does not state the majority view and is not binding. "[I]t needs no citation of authority to point out that a majority opinion of the Supreme Court states the law and that a dissenting opinion has no function except to express the private view of the dissenter." (*Wall v. Sonora Union High School Dist.* (1966) 240 Cal.App.2d 870, 872; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337.) In any event, Justice Werdegar did not advocate a specific definition of "in association with." Neither she nor the majority stated that the term was a "technical legal term" requiring either a sua sponte special instruction or modification of CALJIC No. 17.24.2. Nothing in *Albillar* suggests that trial courts must sua sponte instruct that acting "in association with a criminal street gang" requires a defendant's reliance " 'on . . . common gang membership and the apparatus of the gang' " to commit the crime, the definition Lopez suggests.

Moreover, Lopez has failed to show that "in association with" has a technical legal meaning that differs from its

commonplace, nonlegal meaning, or that a jury would have difficulty understanding the statutory language without guidance. In fact, Justice Werdegar's dissent cites to a common definition of "associate," i.e., that contained in "Merriam-Webster's Eleventh Collegiate Dictionary (2004)." (*Albillar*, *supra*, 51 Cal.4th. at p. 70, fn. 2 (conc. & dis. opn. of Werdegar, J.).)

C. Cumulative Error

Lopez contends that the cumulative effect of the purported errors deprived him of a fair trial. But "[b]ecause we have found no error, there is no cumulative prejudice to evaluate." (*People v. Lopez* (2018) 5 Cal.5th 339, 371; see also *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 499 ["To the extent any errors occurred, none were prejudicial," whether considered singly or cumulatively].)

D. Review of in Camera Examination of Peace Officer Records

Before trial, Lopez sought discovery of peace officer personnel records pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531. The trial court found good cause for an in camera review of Detective Michael Arteaga's records for complaints related to dishonesty. On August 3, 2015, the trial court conducted an in camera review. Lopez requests that we review the sealed transcript of the trial court's *Pitchess* review to determine whether the court abused its discretion by failing to order disclosure. (See *People v. Mooc* (2001) 26 Cal.4th 1216.)

Trial courts are vested with broad discretion when ruling on motions to discover peace officer records (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086), and we review a trial court's ruling

for abuse (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330). We have reviewed the sealed transcript of the in camera hearing conducted on August 3, 2015. The transcript constitutes an adequate record of the trial court's review, and reveals no abuse of discretion. (*People v. Mooc*, at p. 1228; *People v. Hughes*, at p. 330.)

E. Remand for Resentencing and Franklin *Hearing*

1. Senate Bill No. 620

As noted *ante*, the jury found Lopez personally and intentionally discharged a firearm, causing David's death, within the meaning of section 12022.53, subdivisions (d) and (e)(1). When the trial court sentenced Lopez in June 2016, imposition of a section 12022.53 firearm enhancement was mandatory and the trial court lacked discretion to strike it. (See *Franklin*, *supra*, 63 Cal.4th at p. 273.) Accordingly, the trial court imposed a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d), for the firearm enhancement.

Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike section 12022.53 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) Lopez contends his case must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements. We agree. The amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.)

The People argue that remand is unnecessary because no reasonable trial court would exercise its discretion to strike the enhancement. They point out that the victim was running away when Lopez shot him in the back; Lopez showed no remorse; and there were no factors in mitigation. It is true that we "need not remand the instant matter if the record shows that the superior court 'would not . . . have exercised its discretion to lessen the sentence.' " (*People v. Johnson* (2019) 32 Cal.App.5th 26, 69; *People v. McVey* (2018) 24 Cal.App.5th 405, 418.) However, remand is required "unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 423—424.)

Here, while the crime was undisputedly heinous, we believe remand is nonetheless appropriate to allow the trial court to exercise its discretion in the first instance. The trial court's comments at sentencing do not clearly indicate whether it would, or would not, have imposed the firearm enhancement had it possessed the discretion to strike it. "Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza*, *supra*, 24 Cal.App.5th at p. 1110; *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425 [" 'Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion' "]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081—1082.) As *People v. Johnson* explained: "Although the trial court was not sympathetic to either [defendant], it is undisputed

that the court had no discretion, at that time, to strike the firearm use enhancement . . . and neither defendant's trial counsel had the opportunity to argue the issues. The subsequently enacted laws provided the court with that discretion, greatly modifying the court's sentencing authority. Thus . . . out of an abundance of caution, we remand this matter for resentencing to allow the superior court to consider whether" to strike the firearm enhancement. (*People v. Johnson*, *supra*, 32 Cal.App.5th at p. 69.) We do the same. We express no opinion about how the court should exercise its discretion on remand.

2. *Franklin* hearing

Lopez argues that he is entitled to a limited remand to allow him to make a record relevant to his eventual youth offender parole hearing. (*Franklin*, *supra*, 63 Cal.4th at p. 284.) We agree that a limited remand is appropriate to allow the trial court to determine whether Lopez was afforded sufficient opportunity to make such a record and, if not, to conduct such a hearing.

In *Graham v. Florida* (2010) 560 U.S. 48, 82, the United States Supreme Court held that sentencing a juvenile to life in prison without the possibility of parole (LWOP) for a nonhomicide offense constitutes cruel and unusual punishment. In *Miller v. Alabama* (2012) 567 U.S. 460, 465, the court extended this ruling, concluding that a mandatory LWOP sentence for a juvenile convicted of murder also violates the Eighth Amendment. (See *People v. Jones* (2017) 7 Cal.App.5th 787, 816—817.) *Miller* reasoned that a mandatory life sentence "precludes consideration of [a juvenile's] chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." (*Miller v. Alabama*, at p. 477.) In

People v. Caballero (2012) 55 Cal.4th 262, our Supreme Court held that these principles also apply to juveniles who are sentenced to the functional equivalent of an LWOP sentence. (*People v. Caballero*, at p. 265; *People v. Jones*, at p. 817; *People v. Tran* (2018) 20 Cal.App.5th 561, 568.)

In response, the California Legislature enacted sections 3051 and 4801, subdivision (c), which took effect on January 1, 2014. (*People v. Jones*, *supra*, 7 Cal.App.5th at p. 817; *People v. Tran*, *supra*, 20 Cal.App.5th at p. 568; *People v. Perez* (2016) 3 Cal.App.5th 612, 618.) Section 3051 provides that a person convicted of an offense carrying a term of 25 years to life, who was under a specified age at the time of his or her controlling offense, shall be provided a youth offender parole hearing during his or her 25th year of incarceration. (§ 3051, subd. (b)(3); *People v. Perez*, at p. 618; *People v. Jones*, at p. 817.) The statute originally applied only to offenders under the age of 18 (Stats. 2013, ch. 312, § 4), but was amended effective January 1, 2016, to apply to offenders who were under the age of 23 when they committed the controlling offense. (*People v. Costella* (2017) 11 Cal.App.5th 1, 8; Stats. 2015, ch. 471, § 1.)[13] Section 4801 provides that the parole board must give great weight to "the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (4801, subd. (c); see *People v. Jones*, at p. 817.)

In *Franklin*, the question before our Supreme Court was whether enactment of sections 3051 and 4801 mooted the

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[13] Section 3051 was amended again in 2017 to apply to persons 25 years of age or younger. (Stats. 2017, ch. 684, § 1.5.)

juvenile defendant's contention that his sentence was the functional equivalent of an LWOP sentence, and therefore cruel and unusual punishment. (*Franklin*, *supra*, 63 Cal.4th at pp. 268, 276–280.) The court answered affirmatively, but further explained that the statutory language contemplates "that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*Id.* at pp. 268, 283; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 66–67.) The court explained that much of that evidence, for example statements from family members, school personnel, and faith leaders, could be more easily assembled " 'at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. [Citation.] In addition, section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile. [Citation.]" (*Franklin*, at pp. 283–284; see *People v. Costella*, *supra*, 11 Cal.App.5th at pp. 8—9.) Therefore, a defendant must be given an opportunity, at sentencing, to "put on the record the kinds of information that sections 3051 and 4801 deem relevant . . . ." (*Franklin*, at p. 284.)

In *Franklin*, the defendant was sentenced before the high court decided *Miller v. Alabama* and before passage of sections 3051 and 4801, subdivision (c). (*Franklin*, *supra*, 63 Cal.4th at

pp. 269, 276.) Because it was not clear whether he had had a "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing," *Franklin* remanded the matter for a determination of whether the defendant had been afforded such an opportunity. (*Id.* at p. 284.)

Here, Lopez was a few days shy of his 22nd birthday when he murdered David; therefore, sections 3051 and 4801 apply to him. He was sentenced on June 10, 2016. Section 3051 was amended to include 21-year-olds months before Lopez's sentencing hearing, and *Franklin* was decided approximately two weeks earlier. Therefore, the People contend, Lopez had an adequate opportunity to make a record of relevant information and remand is unnecessary. Lopez counters that nothing in the record suggests his counsel, the prosecutor, or the trial court was aware of *Franklin*'s existence. Further, to the extent defense counsel was required to present such information at the sentencing hearing but failed to do so, Lopez argues counsel provided ineffective assistance.

We believe a limited remand is appropriate to allow the trial court to determine whether Lopez had sufficient opportunity to "make a record of information relevant to his eventual youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284; *People v. Costella*, *supra*, 11 Cal.App.5th at p. 9.) *People v. Jones* is instructive. Jones was sentenced after the enactment of section 3051 and the amendment of section 4801 changing the applicable age to 23, but before the *Franklin* decision, and defense counsel presented no youth-related information at sentencing. (*People v. Jones*, *supra*, 7 Cal.App.5th at p. 819.) *People v. Jones* rejected the People's argument that Jones "had

'the opportunity to present as much *Miller* evidence as he desired' " at sentencing. (*Ibid.*) The court reasoned: "Prior to *Franklin*, . . . there was no clear indication that a juvenile's sentencing hearing would be the primary mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future. *Franklin* made clear that the sentencing hearing has newfound import in providing the juvenile with an opportunity to place on the record the kinds of information that 'will be relevant to the [parole board] as it fulfills its statutory obligations under sections 3051 and 4801.' " (*Ibid.*; see *People v. Tran*, *supra*, 20 Cal.App.5th at p. 570 ["it wasn't until *Franklin* was decided that juvenile offenders were expressly afforded" the right to present evidence bearing on future parole suitability at sentencing].) *Jones* refused to assume that the defendant and his counsel anticipated the extent to which evidence of youth-related factors would be a critical component of the sentencing hearing. Because it was unclear whether the defendant understood the need and opportunity to develop the record, remand for a *Franklin* hearing was appropriate. (*Jones*, at pp. 819–820; see *People v. Costella*, *supra*, 11 Cal.App.5th at p. 9 [ordering limited remand to allow determination of whether defendant had adequate opportunity to make record of youth offender-related information]; but see *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089 [remand not required where sections 3051 and 4801 were effective at time of sentencing, although *Franklin* had not been decided; the court repeatedly asked whether defense counsel wished to add any information to probation report].)

Here, defense counsel apparently did not prepare a sentencing memorandum, nor did he present materials

pertaining to Lopez's characteristics and circumstances as contemplated by sections 3051 and 4801. The prosecutor's sentencing memorandum did not suggest the court should consider any youth-related factors. At the sentencing hearing, defense counsel did not present any evidence concerning Lopez's level of maturity, cognitive ability, or other youth-related factors.

It is true, as the People argue, that *Franklin* had been decided by the time the sentencing hearing transpired.[14] But, preparing for a *Franklin* hearing is likely to entail significant investigation and amount to a fairly lengthy process. (See *People v. Tran*, *supra*, 20 Cal.App.5th at p. 570 ["We suspect it will take a considerable amount of time and effort for appellant and his attorney to prepare for a *Franklin* hearing. At a minimum, they will have to gather records, letters and other information on appellant's behalf and look into the prospect of psychological testing and a risk assessment analysis"].) Given the brief period between *Franklin*'s issuance on May 26, 2016, and the sentencing hearing on June 10, 2016, it seems likely there was insufficient time for counsel to conduct the requisite investigation and preparation. Given counsel's complete failure to address the relevant factors, and the brief period between *Franklin*'s issuance and sentencing, we are not inclined to assume counsel was aware that the sentencing hearing would be the primary mechanism for creating a record of youth-related factors. (See *People v. Jones*, *supra*, 7 Cal.App.5th at p. 819; *People v. Tran*, at p. 570 ["the issue [at the eventual youth offender parole hearing] will be

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[14] The People also suggest that because Lopez filed a new trial motion, he had an adequate opportunity to present relevant mitigating information. But Lopez's motion for a new trial was filed in February 2016, before *Franklin* was decided.

whether a middle-aged man who has spent a quarter-century in prison should be released. We think decisions like that should be as informed as possible"].)

In arguing that remand is not required, the People stress that Lopez's conduct was heinous: The victim was running away when Lopez murdered him; the victim posed no danger to the defendants; Lopez fled to Mexico after the crime and showed no remorse; and no mitigating evidence existed. However, the question is not simply whether the crime was atrocious, but whether Lopez had the opportunity to place the "kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing" on the record. (See *Franklin*, *supra*, 63 Cal.4th at p. 284.)

The People also cite *People v. Cornejo* for the proposition that remand is not required. But in *Cornejo*, the defendants actually produced the type of information that would have been relevant at a *Franklin* hearing: One defendant presented numerous character reference letters relating to whether he was irreparably corrupt; the other presented a neuropsychological evaluation showing severe mental disabilities, along with evidence of a pathological family background. (*People v. Cornejo*, *supra*, 3 Cal.App.5th at pp. 68–69.) Because this information would be available at a youth offender parole hearing, no remand was necessary. (*Id.* at pp. 69–70.) Here, in contrast, no such information was presented.

Accordingly, we remand the matter so the trial court can make a determination whether Lopez was afforded an adequate opportunity to make a record of information that will be relevant to his future youth offender hearing. If not, the trial court is directed to follow the procedures outlined in *Franklin* to ensure

that Lopez is afforded the opportunity to develop the record. (See *Franklin*, *supra*, 63 Cal.4th at p. 284 [describing submissions and testimony that may be received at such a hearing]; *People v. Tran*, *supra*, 20 Cal.App.5th at p. 570; *People v. Jones*, *supra*, 7 Cal.App.5th at pp. 818–820.)

DISPOSITION

The matter is remanded to (1) allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53 firearm enhancement pursuant to section 12022.53, subdivision (h); and (2) for a determination whether Lopez had an adequate opportunity to make a record of information that will be relevant to his eventual youth offender parole hearing, and, if not, to allow the parties the opportunity to make a record of such information pursuant to *Franklin*, *supra*, 63 Cal.4th 261. The judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.